

## FOREWORD

### "THE FEDERAL COURTS": CONSTITUTING AND CHANGING THE TOPIC

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I am honored to write the foreword to this issue of the *University of Richmond Law Review* dedicated to "The Federal Courts." The editors have asked me to address the question of the role of the federal judiciary today. No issue is more pressing within federal judicial circles. The Congress has, in the last few years, enacted several jurisdictional statutes, some that expand<sup>1</sup> and others that limit<sup>2</sup> the authority of the federal courts, thereby raising questions about congressional powers

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\* Arthur Liman Professor of Law, Yale Law School. © All rights reserved. I write here about the Federal Courts by drawing on my work as a teacher of classes and commentator on The Federal Courts, as well as an occasional litigator and as a member of committees constituted by those courts, including the Ninth Circuit's Gender Bias Task Force, on which I served. My thanks to Tara Veazey and Megan Johnson (Yale Law School, class of 2000), to Professor Dennis Curtis, and to Professor Vicki Jackson for thoughtful help with this commentary.

1. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (striking federal court jurisdiction over alleged crimes involving possession of guns within 1000 feet of a schoolyard, 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988), which was part of the Gun-Free School Zones Act of 1990).

2. See, for example, the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996), codified at various places including 18 U.S.C. § 3626(b) (Supp. 1998), the constitutionality of which is the subject of several appellate court opinions, including *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997) (the Second Circuit has granted this case a rehearing en banc); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997), *petition for cert. filed* (U.S. Jan. 5, 1998) (No. 97-7420); and *Taylor v. United States*, Nos. 97-16069, 97-16071, 1998 WL 214578 (9th Cir. May 4, 1998).

over federal jurisdiction. The shape of the appellate structure of the federal courts is now under review pursuant to the congressionally-chartered Commission on Structural Alternatives for the Federal Courts of Appeals.<sup>3</sup> The Executive and the Senate have been engaged in struggles over the nomination of individual judges,<sup>4</sup> and the American Bar Association has recently reported its concern about attacks on the independence of the judiciary.<sup>5</sup>

As these recent events and the breadth of materials covered in this volume reflect, the rubric of "The Federal Courts" is broad, encompassing a wide array of topics. Yet even with a capacious umbrella, debate about what should be within federal court domain is ongoing, and, hence, the title of this introduction: *Constituting and Changing the Topic*.

One longstanding issue is the relationship between the Congress and the federal courts. Questions—stemming from the constitutional text<sup>6</sup> and case law from the nineteenth century<sup>7</sup>—exist about the scope of federal jurisdiction and the respective roles of the Congress, the Executive, and the judiciary in determining what issues are on the docket of the federal courts. Aspects of these issues are explored in the essay by Phillip M. Kannan on the use of advisory opinions,<sup>8</sup> in the Austin Owens Lecture by the Honorable Robert E. Payne,<sup>9</sup> and in the comments, one by Charles D. Bonner on "federalization" of crime<sup>10</sup> and the other by John P. Cunningham on the enactment of a federal death penalty statute.<sup>11</sup>

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3. See Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491-92 (1997).

4. See, e.g., *Conserving Judicial Resources: Considering the Appropriate Allocation of Judgeships in the United States Court of Appeals for the Second and Eighth Circuits: Hearings before the Subcomm. on Administrative Oversight and the Courts of the Senate Committee on the Judiciary*, 105th Cong. (1997).

5. See AMERICAN BAR ASSOCIATION, AN INDEPENDENT JUDICIARY: REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997).

6. U.S. CONST. art. III, § 2.

7. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

8. See Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769 (1998).

9. See The Honorable Robert E. Payne, *Difficulties, Dangers & Challenges Facing the Judiciary Today*, 32 U. RICH. L. REV. 891 (1998).

10. See Charles D. Bonner, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905 (1998).

11. See John P. Cunningham, *Death in the Federal Courts: Expectations and Real-*

A second question, based upon transformations of this century, is about the role of the federal trial court, with its judges moving toward an ever-increasingly managerial stance<sup>12</sup> and its ranks thickening with the creation of bankruptcy and magistrate judgeships. Both the interview with Judge Merhige<sup>13</sup> about his thirty years on the federal bench and the discussion by Heather Russell Koenig about the "rocket docket" in the Eastern District of Virginia<sup>14</sup> offer reflections on the civil process and the role of judges.

A third subject explored in this volume is about the effects of gender, race, and ethnicity on the work of "The Federal Courts."<sup>15</sup> The *University of Richmond Law Review* has done a great service by providing the first compilation published in a law review of commentary by most of the federal circuits about the projects undertaken to consider what some call "bias" and what others call "fairness" in the Federal Courts.<sup>16</sup>

Depending upon how one conceives of the issue, the questions raised here are either familiar or novel to federal courts jurisprudence. The Equal Protection and Due Process Clauses of the Constitution reflect national concerns, that date from the begin-

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ities of the Federal Death Penalty Act of 1994, 32 U. RICH. L. REV. 939 (1998).

12. See generally Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133 (1997) [hereinafter *Changing Practices, Changing Rules*]; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

13. See The Honorable Robert R. Merhige, Jr., *The Federal Courts: Observations from Thirty Years on the Bench*, 32 U. RICH. L. REV. 867 (1998).

14. See Heather Russell Koenig, *The Eastern District of Virginia: A Working Solution for Civil Justice Reform*, 32 U. RICH. L. REV. 799 (1998).

15. See Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts*, 32 U. RICH. L. REV. 615; *Commentaries on Bias in the Federal Courts*, 32 U. RICH. L. REV. 645, 645-768 (1998) (compilation of essays by judges and circuit executives from 11 of the federal circuits).

16. Many of the individual circuit reports have been republished in law reviews. See, e.g., THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE, reprinted in 67 S. CAL. L. REV. 745 (1994); FINAL REPORT & RECOMMENDATIONS OF THE EIGHTH CIRCUIT GENDER FAIRNESS TASK FORCE, reprinted in 31 CREIGHTON L. REV. 9 (1997) [hereinafter EIGHTH CIRCUIT REPORT]; REPORT OF THE SPECIAL COMMITTEE ON GENDER TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE, AND ETHNIC BIAS, reprinted in 84 GEO. L.J. 1657 (1996); REPORT OF THE THIRD CIRCUIT TASK FORCE ON EQUAL TREATMENT IN THE COURT, reprinted in 42 VILL. L. REV. 1355 (1997). A report from the Second Circuit will be reprinted in a forthcoming issue of the *New York University Law Review*.

ning of this nation, about fair treatment of individuals. But, it was not until after the Civil War and then during this century that those concepts came to be understood as protecting all individuals in the United States. For more than one hundred years, constitutional amendments and jurisdictional statutes have given an important role to the Federal Courts to ensure equal treatment. Doctrinal interpretations of both constitutional and statutory guarantees during the 1960s<sup>17</sup> enabled the federal courts to become identified as venues particularly concerned with civil rights. Federal courts are also identified as leaders in the administration of justice,<sup>18</sup> and federal judges have long sought assistance from lawyers and academics to work with judges on projects related to courts' needs. Special judge-lawyer committees dot the landscape of the Federal Courts, a recent example being the creation of Civil Justice Advisory Groups by the Civil Justice Reform Act of 1990.<sup>19</sup> Projects on gender, race, and ethnicity in the Federal Courts could be seen as falling within this rubric and thus easily identified as part of the "traditional work" of the federal courts.

But task forces on gender, race, and ethnicity also represent innovations for court systems—whether they be state or federal. Concerns about equal treatment and fairness are often brought into courts by litigants distressed by problems "out there"—in institutions such as schools and universities or the workplace. In the litigation of cases about discrimination, questions are focused on how particular defendants have treated certain plaintiffs.

Task forces on gender, race, and ethnicity are not about "other" institutions, but focus inward, on courts. Further, unlike cases about discrimination, court-based self-study efforts are not about finding acts of discrimination but rather about learning

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17. See, e.g., *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978); *Monroe v. Pape*, 365 U.S. 167 (1961).

18. See, for example, the enactment of the Federal Rules of Civil Procedure in the 1930s and the creation of the administrative structure of the federal courts, beginning in the late 1920s with the establishment of the Administrative Office of the United States Courts, discussed in Resnik, *Changing Practices, Changing Rules*, *supra* note 12.

19. 28 U.S.C. §§ 471-482 (1993).

how gender, race, and/or ethnicity affect the processes of courts. The purpose of such task forces is not to identify particular wrongs by specific individuals but rather to look at structural and institutional relations. The issues include interactions within court rooms and those that occur "off the record" among attorneys, litigants, and judges; the composition of courts' dockets and the handling of particular kinds of subject matters; the decisions made by courts as employers about staff worklife; and how courts handle their work as administrative institutions organizing committees, holding conferences, and appointing attorneys to serve in an array of functions. Task forces consider data about these organizational aspects of courts in light of this country's history of *de jure* and *de facto* distinctions based on gender, race, and ethnicity to learn the effects of that history on present-day operations of courts.

The *University of Richmond Law Review* has given us a rare opportunity to understand more about this self-reflection undertaken by several circuits—a work surveyed and analyzed in the overview by Lynn Hecht Schafran<sup>20</sup> and then discussed by the eight federal judges and four circuit executives who have contributed to this volume.<sup>21</sup> For readers new to such task forces, the projects described are part of a larger body of materials and activities, spanning the country and located in more than forty jurisdictions, both state and federal. As of the summer of 1997, thirty-nine reports on gender in the courts and nineteen on race and ethnicity had been published. The projects enjoy broad support from official organizations of both the state and federal judiciaries; the Conference of Chief Justices of the State Courts has twice endorsed this work and the Judicial Conference of the United States has done so as well.<sup>22</sup>

What does one learn from this collection of commentaries? First, there is much to admire; the work "briefed" in this volume constitutes an impressive achievement. Judges on most of

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20. See Schafran, *supra* note 15.

21. See *Commentaries on Bias in the Federal Courts*, *supra* note 15.

22. See Schafran, *supra* note 15, at 619-20, 624-25; Judith Resnik, *Gender in the Courts: The Task Force Reports*, in *THE WOMAN ADVOCATE: EXCELLING IN THE 90'S* 7 (Jean MacClean Snyder & Andrea Barmash Greene eds., 1995); see also Judith Resnik, *Asking About Gender in Courts*, 21 *SIGNS* 952 (1996).

the federal circuits and in most of the states have, in their official capacities, commissioned studies to inquire into their own ability to make good on the promise of equal justice to all. They deserve credit for a willingness to engage in self-study.

We live in a world in which the rule of law is demonstrably fragile. Here, in the United States, within the last few years we have seen the bombing of a federal building, threats of violence against individual judges and justices of the peace, a number of attacks on the decisions of specific jurists, and calls for impeachment of judges based on their rulings.<sup>23</sup>

Task forces on gender, race, and ethnicity provide one positive response to such negativity. Described in the essays from those circuits that have undertaken task forces is a remarkable outpouring of volunteer work by lawyers, judges, law students, and academics, all donating time and energy out of friendship and respect for courts. Here we see the *pro bono* tradition of the legal profession at its best, in service of values of inclusion and in response to concerns about lack of equal treatment.

Second, we learn that work on gender, race, and ethnicity is undertaken with differing degrees of enthusiasm, reminding us that the question of what falls within the domain of "The Federal Courts" remains contested. Two of the circuits—the Ninth and the District of Columbia—led the way. The Ninth was both the first within the federal system to report on the effects of gender in its courts<sup>24</sup> and the first to create a second task force, devoted to questions of race, religion, and ethnicity. Through these two undertakings, the Ninth Circuit has demonstrated its continuing support for this kind of activity. The essay in this volume, co-authored by the Chief Judge of the Circuit and two district court judges, offers assistance to "others

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23. See, e.g., DAVID BARTON, *IMPEACHMENT! RESTRAINING AN OVERACTIVE JUDICIARY* (1996).

24. See The Honorable Dorothy W. Nelson, *Introduction to THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE*, reprinted in 67 S. CAL. L. REV. 731, 732 (1994) (reprinting the 1993 report, presented as a preliminary draft to the Circuit in 1992).

setting forth on a similar journey"<sup>25</sup> by detailing the history, the findings, and the implementation efforts since 1994 of the Ninth Circuit's gender bias task force. Its methodology included gathering new quantitative data through social science surveys of some 3500 lawyers, as well as eighty percent of its judges, and certain segments of court staff; reviewing extant data; and focusing on specific subject matters (such as bankruptcy, criminal law, federal benefits, federal Indian law, and employment law).

Also in the forefront were the Special Committees of the D.C. Circuit. Unlike the Ninth Circuit, the District of Columbia's project addressed both gender and race from its beginning. Like the Ninth Circuit, the methods included social science surveys (of more than 1700 attorneys) and study of existing data. After learning about courtroom interactions and employee worklife, that report offered recommendations, including educational programs, outreach to increase "awareness of service opportunities," revision of complaint procedures to include informal modes of resolution, the adoption of official sexual harassment policies, and increasing support of employee and participants' family obligations.<sup>26</sup>

Since 1993, other circuits have also engaged in enterprising projects with various methodologies and scope. The First Circuit innovated by addressing surveys to "court users"<sup>27</sup> as well as to attorneys and court employees. We learn that "the study was widely appreciated and has successfully created a valuable dialogue concerning perceptions of gender bias and the most effective forms of remedial measures."<sup>28</sup> The Third Circuit "chose to focus on gender, race, and ethnicity;"<sup>29</sup> its committees, aided by a project director and social scientists, gathered data from a range of participants including judges, attorneys, court employ-

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25. The Honorable Procter Hug, Jr., The Honorable Marilyn L. Huff & The Honorable John C. Coughenour, *Ninth Circuit: The Gender Bias Task Force*, 32 U. RICH. L. REV. 735, 735 (1998).

26. The Honorable John Garrett Penn & Matthew J. DeVries, *D.C. Circuit: Study of Gender, Race, and Ethnic Bias*, 32 U. RICH. L. REV. 765, 768 (1998).

27. The Honorable Bruce M. Selya, *First Circuit: A Study of Gender Bias In and Around the Courts*, 32 U. RICH. L. REV. 647, 652-53 (1998).

28. *Id.* at 656.

29. The Honorable Dolores K. Sloviter, *Gender, Race, and Ethnicity—Task Force on Equal Treatment in the Courts*, 32 U. RICH. L. REV. 707, 708 (1998).

ees, and bankruptcy debtors. That task force learned that "the overall record of the courts and administrative units of the Third Circuit is a positive one,"<sup>30</sup> but also found that views on courts varied by gender, race, and ethnicity.<sup>31</sup> The Eighth Circuit also relied on an executive director and social scientists to consider gender and the courts. It found that women constituted under seventeen percent of attorneys in the district court bars, about nineteen percent of the attorneys practicing in the appellate court, and that, "women significantly more often experienced more hostility during the litigation process. Women reported general incivility, gender-related incivility, and unwanted sexual attention much more than males. . . ."<sup>32</sup> The Eleventh Circuit provided its Executive Summary for this volume, with its demographic profiles of the courts, the bar, and employees, all detailing responses to questions about interactions among court personnel, judges, litigants, and lawyers.<sup>33</sup>

The Tenth Circuit took a different tack, "opting for local study groups within each district in the Tenth Circuit"<sup>34</sup> that permitted a focus on the diversity of experiences within the territorial boundaries of the Circuit. Further, rather than do quantitative surveys, the Tenth Circuit used "qualified interviewers" to gather "qualitative" data.<sup>35</sup> Reported here is information from the District of Wyoming, which found few problems but established goals including the establishment and publication of policies on sexual harassment. But planned activity within the Tenth Circuit was interrupted by efforts by some members of Congress to curtail funding. The current approach of the Tenth Circuit is to rely on a Tenth Circuit Gender, Race, and Ethnic Bias Committee to review employee practices and to provide educational programs.<sup>36</sup>

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30. *Id.* at 713 (quoting its report).

31. *See id.* at 719.

32. The Honorable Lyle E. Strom, *Eighth Circuit: Gender Fairness Task Force*, 32 U. RICH. L. REV. 731, 732 (1998).

33. *See Eleventh Circuit: "Executive Summary"—Report of the Eleventh Circuit Task Force on Gender Bias*, 32 U. RICH. L. REV. 751 (1998).

34. The Honorable David M. Ebel, *Tenth Circuit: Gender Bias Study—Continuing Education and Training*, 32 U. RICH. L. REV. 745, 745 (1998).

35. *Id.*

36. *See id.* at 748-50.



Other circuits are more circumspect in their self-description. While the Second Circuit has circulated voluminous reports, a very brief description is offered here highlighting only limited findings related to deliberate discrimination.<sup>37</sup> Other circuits, providing differing explanations, have declined to launch circuit-based studies. The Seventh Circuit recommended that individual courts within the circuit create task forces to address issues of racial and gender fairness, conduct yearly programs, report to the council on such activities, and provide structures for complaints.<sup>38</sup> The Fifth Circuit reports that it has chosen "to build and learn from previous studies rather than conduct an additional costly and lengthy study, which likely would reach generally similar conclusions."<sup>39</sup> Instead, the Fifth Circuit decided to provide "educational programs and workshops for judges and court support employees" to address "issues concerning gender bias" and to give them "the warranted attention."<sup>40</sup> The Fourth Circuit relied on the existence of procedures to handle complaints and a desire not to use resources to duplicate prior studies as reasons for not proceeding with a study.<sup>41</sup> The Federal Circuit reports that it has neither ongoing projects nor results to include in this symposium.<sup>42</sup> The Sixth Circuit declined the invitation to comment.<sup>43</sup>

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37. Compare George Lange, III, *Second Circuit: Study of Gender, Race, and Ethnicity*, 32 U. RICH. L. REV. 703, 704 (1998) (briefly summarizing the process and describing findings of "virtually no incidents of deliberate bias"), with THE SECOND CIRCUIT TASK FORCE, REPORT OF THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS (1997); GENDER COMMITTEE & RACIAL AND ETHNIC COMMITTEE, REPORT OF THE WORKING COMMITTEES TO THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS (1997); CARROLL SERON, MARTIN FRANKEL, DOUGLAS MUZZIO, JOSEPH PEREIRA, GREGG VAN RYZIN & LOUIS HARRIS AND ASSOCIATES, A REPORT OF THE PERCEPTIONS AND EXPERIENCES OF LAWYERS, JUDGES, AND COURT EMPLOYEES CONCERNING GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE FEDERAL COURTS OF THE SECOND CIRCUIT OF THE UNITED STATES (1997); EMPLOYMENT ECONOMICS DIVISION OF PRICE WATERHOUSE, STATISTICAL ANALYSIS FOR THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURT (1996).

38. See Collins T. Fitzpatrick, *Seventh Circuit: Fairness in the Federal Courts*, 32 U. RICH. L. REV. 725, 727-29 (1998).

39. Gregory A. Nussel, *Fifth Circuit: Study of Gender Bias*, 32 U. RICH. L. REV. 723, 724 (1998).

40. *Id.*

41. See, e.g., Samuel W. Phillips, *Fourth Circuit: The Judicial Council's Review on the Need for a Gender Bias Study*, 32 U. RICH. L. REV. 721, 721 (1998).

42. Conversation with Editors of the *University of Richmond Law Review*.

43. See *id.*

As this brief summary suggests, a third lesson from the commentaries is that the world of courts looks a good deal like the world outside of courts. While we might wish that the categories of gender, race, and ethnicity have no saliency within the institutions of law, such a conclusion cannot be based on the studies undertaken. As the Third Circuit put it, its study "confirmed that men and women, whites and minorities view their experiences in the judicial system very differently."<sup>44</sup> It is not that gender, race, and ethnicity always matter, or that they always matter a lot, but rather that the experiences of the relevance of gender, race, and ethnicity are not uniform. Women more than men respond, in quantitative research surveys, that gender is sometimes relevant; people whose color is not white respond more often than people whose color is white that race and ethnicity affect decision making and/or process.

Fourth, the commentaries from the circuits, coupled with the backdrop of the many state task forces, offer insight into why such work continues to be needed. As is evident from a couple of the circuits, the existence of these other projects has been invoked to justify declining to do another study. Yet reasons to continue to investigate and talk about gender, race, and ethnicity are readily apparent from the most recent reports. For example, as the Eighth Circuit found in 1997, many of the difficulties experienced are neither "on the record" nor otherwise readily visible. Rather, women in the litigation process encounter gender-based incivility that can only be found by seeking aggregate quantitative information about interpersonal interactions among attorneys in discovery and pretrial processes.<sup>45</sup> Part of the "task" of a "task force" is to make visible the ways in which the history of legally-based gender and racial distinctions continues to play out, sometimes in a subtle fashion, in the present day. And then, having brought such issues to light, task forces do more, by producing a host of remedial efforts ranging from educational programs and handbooks to rules and case law.<sup>46</sup>

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44. Slovirer, *supra* note 29, at 718.

45. See Strom, *supra* note 32, at 732; see also EIGHTH CIRCUIT REPORT, *supra* note 16, at 132-35.

46. See Vicki C. Jackson, *What Judges Can Learn from Gender Bias Task Force Studies*, 81 JUDICATURE 15, 18 (1997); see also Schafran, *supra* note 15, at 635-37.

In addition to the invisibility of differential treatment and experiences, another reason to continue such inquiry comes from the understandable instinct to believe that problems of discrimination, now formally banned, have diminished so substantially that it is time to “move on” to other issues. Given that court culture is committed to the “rule of law,” the impulse to move on is all the more powerful. Experiences of problems of gender or race are likely to be discounted because of the professional ideological commitment of lawyers and judges to fair treatment. The assumption in this context is that, because of a commitment to fairness in the federal courts, all within their aegis must—perforce—experience them *as* fair. Questioning this assumption is difficult, but making oneself press against one’s own assumptions is one of the most valuable aspects of establishing task forces or of forming committees to address these questions.

Moreover, given that the world inside courts resembles the world outside courts, we know that conversations about gender, race, and ethnicity are not always easy to have, and some people would prefer to avoid the topic altogether. Some of the task forces have worked in environments open to such enterprises, in which such “dialogue” (a word from of the First Circuit’s commentary<sup>47</sup>) has been encouraged, while other task forces have found a more difficult reception, sometimes imposed externally (as noted by the Tenth Circuit’s commentary<sup>48</sup>) and sometimes coming from within.<sup>49</sup>

When task forces exist in welcoming environments, they create important opportunities for complex and sometimes painful explorations of problems that haunt the United States and that are not eliminated by refusal to think about them. In this respect, “The Federal Courts” are a venue *par excellence* for such conversations to take place. The two hundred year history with which I began is rich with examples of “The Federal Courts” as sites of conflict over the meaning and purpose of the nation and over the roles played by the Congress and the

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47. Seyla, *supra* note 27, at 649.

48. See Ebel, *supra* note 34, at 748.

49. See Schafran, *supra* note 15, at 623 (discussing difficulties in the District of Columbia’s project).

courts in shaping national dialogues about national values. The topics on the agenda of "The Federal Courts" are ever-changing. The changing parameters of what is on the national docket and the varying stories about what should be on that docket can be seen from a retrospective review, from the first years of a Supreme Court docket filled with diversity cases about control over land to the recent image of a Court engaged with racial and gender equality.<sup>50</sup> While one cannot predict what topics will occupy the federal courts even thirty years from now, one can predict that debate about what constitutes the appropriate domain of "The Federal Courts" will still be lively.

The essays within this volume of the *University of Richmond Law Review* contribute to that debate. My thanks to their authors for a willingness to take on difficult but central issues about what topics should occupy the attention of those concerned about "The Federal Courts."

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50. See generally Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171 (1995).